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 BE IN INC.

12
 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN JOSE DIVISION
 16

17 BE IN INC., a New York Corporation,

18 Plaintiff,

19 v.

20 GOOGLE INC., a California corporation;
 YOUTUBE, LLC, a Delaware limited liability
 21 company; and GOOGLE UK LTD., a private
 limited company registered in England and
 22 Wales,

23 Defendants.
 24

Case No. 5:12-CV-03373-LHK

**PLAINTIFF BE IN INC.'S
 OPPOSITION TO DEFENDANTS'
 MOTION TO DISMISS THE
 FIRST, THIRD, AND FOURTH
 CAUSES OF ACTION OF THE
 SECOND AMENDED
 COMPLAINT**

The Honorable Lucy H. Koh

Hearing: November 21, 2013
 Time: 1:30 p.m.
 Courtroom: 8

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1 **I. INTRODUCTION**

2 Google misunderstands its burden on a motion to dismiss. The only issue is the
3 sufficiency, solely as a matter of pleading, of the Second Amended Complaint as filed (“SAC”
4 [ECF No. 59]). Be In’s complaint is extensively detailed and alleges specific facts that meet each
5 element of each cause of action, far exceeding what is required to defeat a motion to dismiss.

6 For example, Google moves to dismiss the trade secret claim on the ground that Be In
7 “does not allege the required element of misappropriation by *improper means*.” (Mot. at 9
8 (emphasis in original).) But Be In has in fact alleged that it disclosed trade secrets to Google and
9 that Defendants have used those trade secrets without authorization. Be In has specifically
10 alleged disclosure to “high-level Google executive” Richard Robinson at a meeting on May 12,
11 2011, and that Defendants misappropriated these trade secrets by incorporating them into their
12 Hangouts product and YouTube. (*See, e.g.*, SAC ¶¶ 2, 5, 38-56, 68-75, 78-83.) Among other
13 things, as described in more detail below, Be In alleges the date, location and content of the
14 meeting (*id.* ¶¶ 47-52); quotes from the correspondence leading up to the meeting in which Be In
15 stated that it required a Non-Disclosure Agreement with Google for the meeting because it
16 intended to disclose “trade secrets that could be harmful to communicate without any protection”
17 (*id.* ¶ 44); alleges Google’s execution of an NDA to cover the meeting (*id.* ¶¶ 43-46); describes
18 the trade secret business strategies and features that were disclosed at the meeting and, at
19 Mr. Robinson’s request, in correspondence following the meeting (*id.* ¶¶ 39-42, 48-52); and
20 alleges specific facts showing Defendants’ misappropriation of the trade secrets, including, in one
21 instance, by using the exact same language proposed by Be In at the May 12 meeting, which
22 Google later tried to remove to cover up its conduct (*id.* ¶¶ 68-75).

23 Instead of addressing the sufficiency of the operative pleading, Google focuses much of
24 its motion on irrelevant comparisons with previous versions of the complaint, including,
25 remarkably, one that never became operative. While wholly irrelevant to this motion, Google
26 shamelessly misrepresents the facts regarding those earlier complaints. For example, Google
27 contends that “With each iteration of the complaint, Plaintiff has whittled down the fact
28

1 allegations for its key claims, until it is now a shell of unsupported conclusions.” (Mot. at 1.)
2 This contention is patently false. Without the benefit of any discovery from Defendants, the
3 Second Amended Complaint is 14 pages *longer* than the original complaint and contains a far
4 more detailed description of the facts supporting the claims. (*Compare* Complaint [ECF No. 1]
5 ¶¶ 21-37 with SAC [ECF No. 59] ¶¶ 18-77.) Google’s contention that the 25 page Second
6 Amended Complaint is a “shell of unsupported conclusions” is absurd. And Google is simply
7 wrong to assert that Be In has abandoned any necessary allegations.

8 The Second Amended Complaint contains more than sufficient detail to support the
9 challenged causes of action. Google’s motion should be denied.

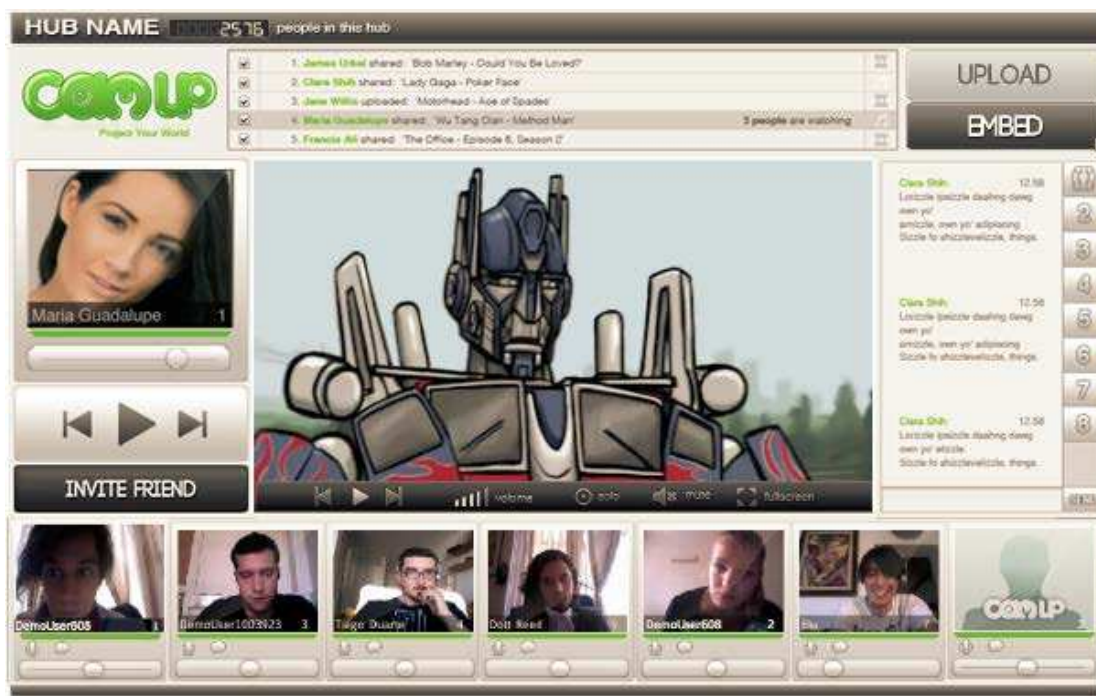
10 II. STATEMENT OF FACTS

11 A. Be In Develops a Groundbreaking, Award-Winning Social 12 Entertainment Platform

13 In 2007, Be In co-founders Elio D’Anna, Joseph D’Anna and Elia D’Anna conceived of
14 CamUp, an award-winning social entertainment consumption platform that allows a group of
15 friends to simultaneously watch, listen, chat and collaborate around shared videos, music, and
16 other media, such as educational content and documents, in a real-time, trusted environment.
17 (SAC ¶¶ 1, 18.) Since 2007, Be In has devoted extensive time and resources to creating the
18 unique design for the CamUp platform, as well as proprietary strategies for integrating that
19 platform into established content, social and media platforms. (*Id.* ¶¶ 1, 19, 21.)

20 In March 2011, Be In publicly unveiled CamUp for the first time at SXSW Interactive—
21 an annual interactive media conference held in Austin, Texas that is widely seen as a launching
22 pad for innovative online platforms and applications. (*Id.* ¶ 24.) CamUp was one of a kind and
23 offered something that no company had ever achieved. (*Id.* ¶ 25.) While others had developed
24 video chat services, social media services, or online entertainment consumption platforms in the
25 past, until Be In’s public release of CamUp in March 2011, no one had developed a platform that
26 combined all of these elements to create a live, familiar environment for shared entertainment
27 consumption and social interaction. (*Id.*) The business and technology community reacted
28 enthusiastically to CamUp’s unique combination of these elements. (*Id.*)

1 Through individual, expressive elements and its overall creative design, CamUp fosters a
2 sense of familiarity and community, without compromising the central entertainment experience.
3 (*Id.* ¶ 26.) For example, each CamUp user has his or her own “room,” which features a large,
4 central frame for viewing shared media (the “Social Player”), and smaller video frames across the
5 bottom of the page, for everyone gathered in that room. (*Id.* ¶ 27.) Frames above and to the sides
6 of the Social Player include a text chat window, as well as a shared media playlist, which
7 accommodates music, videos, photos, documents, and other media, and can be added to and
8 modified by anyone inside the room. (*Id.*) The Social Player is designed to be “center stage,”
9 occupying dominant visual space in each online “room”—a design choice that reflects the
10 primacy of the shared entertainment experience to the CamUp platform. (*Id.*) This is an example
11 of the overall design of CamUp and the individual elements of that design:



24 B. Google Sees CamUp Demonstrated in March and April 2011

25 When CamUp debuted at the SXSW conference, Be In gave live demonstrations only
26 steps away from Google’s booth. (SAC ¶ 32.) During the conference, several Google personnel
27 visited the Be In booth, viewing the demonstrations and discussing the CamUp platform with Be
28 In representatives. (*Id.* ¶ 33.) At no point during SXSW did anyone from Google publicly

1 announce or suggest privately to Be In that Google was developing any platform or product
2 similar to CamUp in any respect. (*Id.*)

3 Around the same time, Be In was named a finalist—and among “the most innovative” and
4 “pioneering” start-ups in digital entertainment—by MIPTV Connected Creativity Ventures in its
5 competition for innovation in connected entertainment. (*Id.* ¶ 35.) In connection with that
6 competition Be In gave a presentation in Cannes, France, that included a live demonstration of
7 CamUp at which at least one senior Google and YouTube executive was present. (*Id.* ¶ 36.) On
8 April 6, 2011, Be In won the “Early Stage” award from MIPTV Connected Creativity Ventures
9 for the most innovative start-up of the year. (*Id.* ¶ 37.)

10 **C. Be In Discloses Its Confidential Strategy to Google**

11 On May 12, 2011, Be In met with a high-level Google executive, Richard Robinson, to
12 discuss Be In’s strategy for how Google could use the innovative CamUp platform to transform
13 its social media and advertising business. (SAC ¶ 2.) The meeting occurred in “Google’s offices
14 in London.” (*Id.* ¶ 47.) Mr. Robinson was contacted by Be In consultant Brian Foss on May 7,
15 2011, who suggested that Be In’s social entertainment consumption platform would “work well
16 with Google and You Tube.” (*Id.* ¶ 38.)

17 On May 9, in an email sent to Mr. Robinson prior to the meeting, Be In asked if he would
18 “agree to signing a Mutual Non-Disclosure Agreement *on behalf of Google*” because Be In
19 intended during the meeting to “dive deeper into our business plan and strategy and to discuss
20 how CamUp can drive tremendous value to giants like YouTube and Google” and to disclose
21 “trade secrets that could be harmful to communicate without any protection.” (*Id.* ¶ 44 (emphasis
22 added).) Rather than use Be In’s form of NDA, Google sent its own NDA to Be In the following
23 day, which Be In signed electronically. (*Id.* ¶¶ 44, 46.)

24 Because Google had executed the NDA, Be In disclosed to Mr. Robinson during the
25 meeting its detailed strategy for, among other things, using the CamUp platform to implement a
26 social entertainment strategy for YouTube and other Google products, and thus to create
27 community and social context around Google’s vast, but largely anonymous user base. (*Id.* ¶ 40.)
28

1 At the time, despite millions of views daily, YouTube viewers were mostly nameless and, while
2 they had the opportunity to post comments to videos, they had no ability to interact with one
3 another through a social network or in a real-time communal setting. (*Id.*) Be In recognized that
4 Google was missing an opportunity to create community and social interaction around YouTube’s
5 content, and Be In developed an innovative strategy to integrate CamUp with Google to seize that
6 opportunity. (*Id.*)

7 One aspect of this integration strategy was the creation of a social plug in between
8 YouTube and CamUp: a button on the bottom right of the YouTube media window inviting users
9 to “Watch with your friends on CamUp.” (*Id.* ¶ 41.) By clicking the button, users would be
10 taken seamlessly into CamUp’s trusted social environment, where users could then watch
11 YouTube videos simultaneously with their friends, while chatting about those videos face-to-face
12 in real time. (*Id.*) As Be In disclosed to Google, this strategy would give Google what it had
13 been attempting unsuccessfully to develop for years: a competitive social network that included a
14 social layer around its myriad products. (*Id.* ¶ 42.) Be In did not disclose its strategy to anyone
15 outside the company prior to meeting with Google in May 2011. (*Id.*)

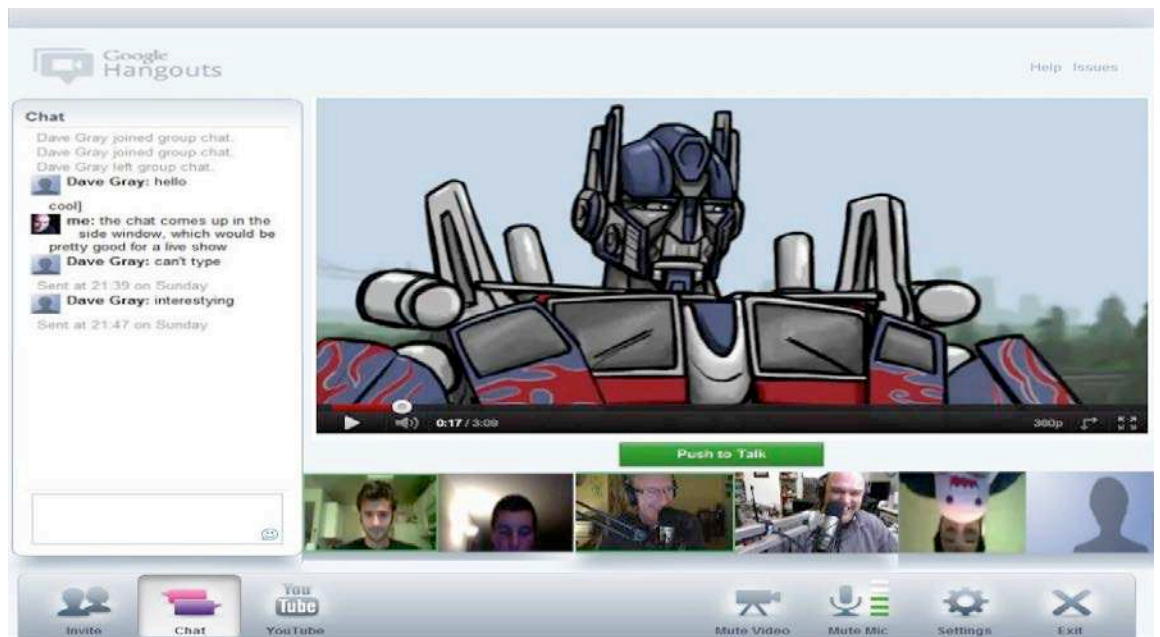
16 Google responded enthusiastically to CamUp and Be In’s social entertainment integration
17 strategy, and asked Be In to provide even more information, in writing, following the meeting.
18 (*Id.* ¶ 3.) The next day, Be In emailed Google an eight page business plan summarizing its
19 proprietary social integration strategy. (*Id.*) After Be In shared its strategic roadmap, Google
20 abruptly terminated all communications with Be In, refusing to respond to emails seeking to
21 arrange the follow-up steps Google had discussed during their meeting. (*Id.*)

22 **D. Google Unlawfully Copies Be In’s Platform and Misappropriates Be**
23 **In’s Trade Secret Strategy**

24 On June 28, 2011, approximately one and a half months after the meeting with Be In, and
25 three months after the unveiling of the CamUp website, Google launched Google+, its then-latest
26 attempt to launch a viable social network to rival Facebook. (SAC ¶ 4.) Google+ included a
27 feature it called “Hangouts”—an integrated social entertainment consumption platform that is
28 virtually identical to CamUp. (*Id.*) It allows groups of friends within the Google+ social network

1 to “hangout” together in an online room, simultaneously watching, listening, chatting and
2 collaborating around shared video and other media. (*Id.*) Before Google launched Hangouts, no
3 company other than CamUp had created this type of social entertainment consumption platform.
4 (*Id.*)

5 The creative design of Hangouts is strikingly similar to CamUp’s unique design in every
6 respect—overall design, layout, look and feel, selection and arrangement of elements, format, tag
7 lines, and color scheme—leaving no doubt that Google copied the CamUp platform in a hurried
8 attempt to bolster its new social network Google+. (*Id.* ¶ 5.) Here is the Google Hangouts
9 interface, which is substantially similar to the CamUp interface above.¹



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21 (*Id.* ¶ 61.) Like CamUp, Hangouts featured a large, central frame for viewing shared media, and
22 up to ten smaller video frames, organized in a single row across the bottom of the page, for
23 everyone participating in the “hangout”—directly analogous to the “rooms” of CamUp. Frames
24 above and to the sides of the central media frame included a text chat window, and in later
25 versions of Hangouts, a playlist, which, like the shared playlist in CamUp, could be modified and

26
27 ¹ The images from Hangouts and CamUp are intended to show how the two web
28 interfaces are substantially similar. The robot cartoon image shown in both examples is merely
an example of shared video content.

1 contributed to by all participants. (*Id.* ¶ 62.) The “free seat” icon—the icon for an available seat
2 in the room for another participant to join—was identical, a dark gray silhouette against a light
3 gray background. (*Id.* ¶ 64.)

4 Google not only copied Be In’s unique entertainment consumption platform, it also
5 implemented, and is continuing to implement, the proprietary business strategies Be In disclosed
6 to Google in confidence in May 2011. (*Id.* ¶ 6.) Among other things, Google integrated
7 Hangouts into YouTube, using the strategy devised by Be In and disclosed to Google. (*Id.* ¶ 68.)
8 When a YouTube user clicked the “Share” button under any YouTube video, an icon appeared
9 inviting the user to “Watch with your friends. Start a Google+ Hangout”—the precise “Watch
10 with your friends” terminology and concept Be In disclosed confidentially to Google. (*Id.*)
11 Clicking the button initiated an instant Hangouts media-sharing session. (*Id.*) Google
12 subsequently modified the language of the button, but when a user would place the mouse over
13 the button, the “Watch with your friends” language would still appear. (*Id.* ¶ 69.) Google later
14 modified the language entirely. (*Id.*)

15 Thereafter, Google continued to rollout the strategy Be In had shared with Google in
16 confidence, including integrating Hangouts with Google Docs and third-party applications,
17 allowing for public broadcasts of Hangouts, and collaborations with education-oriented partners.
18 (*Id.* ¶¶ 72-75.)

19 **E. Google Misstates the Facts**

20 Google seeks to distract from the facts pleaded by Be In in support of its claims by
21 peppering its motion with misstatements that have nothing to do with the sufficiency of the
22 Second Amended Complaint.

23 *First*, as noted above, it is simply false that “With each iteration of the complaint, Plaintiff
24 has whittled down the fact allegations for its key claims.” The Second Amended Complaint is
25 14 pages longer, and much more detailed, than the original complaint. (*Compare* Complaint
26 [ECF No. 1] ¶¶ 21-37 *with* SAC [ECF No. 59] ¶¶ 18-77.)

1 *Second*, Be In did not drop Richard Robinson as a defendant because his declaration
2 purportedly refutes Be In’s claims, as Google implies. (Mot. at 2.) Rather, at Google’s request,
3 Be In dismissed Mr. Robinson in his individual capacity as a courtesy because there was no need
4 to pursue individual liability. The Robinson declaration is not before the Court on this motion,
5 but it must be noted that Mr. Robinson, in fact, admits to a failure of memory on many points in
6 dispute, and that his assertions have neither been tested by cross-examination nor substantiated by
7 a document production by Google. Mr. Robinson’s recollection also conflicts with that of Be In
8 representatives at the meeting who, among other things, will testify they provided Mr. Robinson
9 with a written diagram of the “Watch with your friends” button that Mr. Robinson took with him
10 from the meeting. (*See* SAC ¶¶ 48, 52.) Mr. Robinson’s declaration makes no mention of the
11 diagram and Google has so far failed to produce it from its files.

12 *Third*, Be In has certainly not “abandon[ed] its allegation that former defendant Richard
13 Robinson wrongfully transmitted alleged secrets to Defendant Google Inc.” (Mot. at 9:15-17.)
14 Indeed, as discussed above, the Second Amended Complaint alleges in detail how Be In’s trade
15 secrets were disclosed to Google’s Mr. Robinson and then used without authorization by Google
16 and YouTube in Hangouts (*see, e.g.*, SAC ¶¶ 38-56, 68-75), and alleges specifically that this
17 constituted “the misappropriation and unauthorized misuse of Be In’s trade secrets disclosed
18 during its May 2011 meeting with Google.” (SAC ¶ 75; *see also id.* ¶¶ 70, 80.) Discovery will
19 examine, and a jury will decide, whether Google’s use of Be In’s proprietary information is just a
20 remarkable coincidence.

21 *Fourth*, Be In’s original complaint did not include a “fake” mock up “that it claimed to
22 have shown Mr. Robinson at the May 12, 2011 meeting” as Google avers. (Mot. at 2:6-9.)
23 Google has been told by prior counsel that the graphic in the original complaint—which is
24 irrelevant as it was superseded by the First and later Second Amended Complaints—was intended
25 simply to illustrate how the “Watch with your friends” *button* in Hangouts is similar to the *button*
26 that was proposed to Google at the May 2011 meeting. (*See* Complaint ¶¶ 35-36.) The complaint
27 never alleged that the graphic was an actual screen shot shown to Mr. Robinson, and Google’s
28

1 deliberate misconstruction of the pleading makes no sense. Google nevertheless persists, hoping
2 to manufacture an issue to distract from the merits. Google has even gone so far as to make the
3 nonsensical assertion that the graphic was “doctored” and “fabricated” because it highlighted the
4 key language with a red oval for emphasis.

5 *Fifth*, Be In has not dropped its allegation that Google visited the CamUp website. This is
6 specifically alleged in paragraphs 57 and 101 of the Second Amended Complaint.

7 **III. LEGAL STANDARD**

8 Under Federal Rule of Civil Procedure 12(b)(6), a complaint need only allege “enough
9 facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
10 544, 570 (2007). In considering a motion to dismiss for failure to state a claim, the Court must
11 accept as true the allegations of the complaint, “construe the pleading in the light most favorable
12 to the party opposing the motion, and resolve all doubts in the pleader’s favor.” *Hebbe v. Pliler*,
13 627 F.3d 338, 340 (9th Cir. 2010).

14 The Court must read the complaint “as a whole, not parsed piece by piece to determine
15 whether each allegation, in isolation, is plausible.” *In re Toyota Motor Corp.*, 790 F. Supp. 2d
16 1152, 1164 (C.D. Cal. 2011) (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th
17 Cir. 2009)) (internal quotation marks omitted); *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165,
18 1171 (N.D. Cal. 2010) (finding plaintiff’s allegations sufficient to deny defendant’s motion to
19 dismiss when the complaint was “read as a whole”). Moreover, “*Twombly* and *Iqbal* do not
20 require that the complaint include all facts necessary to carry the plaintiff’s burden.” *al-Kidd v.*
21 *Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009), *rev’d on other grounds*, 131 S. Ct. 2074 (2011).

22 **IV. ARGUMENT**

23 **A. Be In’s Detailed Allegations of How Google Took and Used Be In 24 Proprietary Information Without Authorization State a Claim for Trade Secret Misappropriation**

25 **1. Be In Specifically Alleges How Google Improperly Used Be In’s 26 Proprietary Business and Market Strategies**

27 The Second Amended Complaint describes Be In’s meeting with Google and disclosure of
28 its confidential, trade secret business and marketing strategies (SAC ¶¶ 38-59), and Google’s

1 subsequent use of those strategies. (*Id.* ¶¶ 68-75, 78-83.) This is more than sufficient to state a
2 claim for trade secret misappropriation.

3 Specifically, Be In alleges that in April 2011, Be In consultant Bryan Foss reached out to
4 Google’s Richard Robinson in London to set up a meeting “suggesting that Be In’s social
5 entertainment consumption platform would ‘work well with Google and YouTube.’” (*Id.* ¶ 38.)
6 Be In insisted on a nondisclosure agreement with Google because Be In intended during the
7 meeting to disclose “trade secrets that could be harmful to communicate without any protection.”
8 (*Id.* ¶ 44.) Google drafted and executed a nondisclosure agreement with Be In. (*Id.* ¶ 46.)

9 Be In representatives then met with Richard Robinson. At that May 12, 2011 meeting, Be
10 In disclosed in detail its confidential proprietary business and marketing strategies, including by
11 providing a proposed design for a “Watch with your friends” button integrating YouTube with a
12 social entertainment consumption platform. (*Id.* ¶¶ 43, 47-52.) Mr. Robinson responded
13 enthusiastically to Be In’s presentation, requested additional materials, and stated he would put
14 Be In in touch with someone from YouTube. (*Id.* ¶ 54.) In response, Be In sent an 8-page
15 confidential strategic business plan. (*Id.* ¶ 52.) Be In never heard from anyone at Google or
16 YouTube again, despite multiple follow-up attempts. (*Id.* ¶¶ 52, 54, 56-57.)

17 Then, Google launched a product, Google Hangouts, that “us[ed] the precise mechanism
18 and strategy devised by Be In and disclosed to Google during the May, 2011 meeting.” (*Id.* ¶ 68.)
19 The Second Amended Complaint provides, in great detail, the specifics of how YouTube
20 integration “roll[ed] out the precise strategy Be In had shared with Google in confidence.” (*Id.*
21 ¶¶ 68-75.) Among other things, this included the launch of a button in YouTube inviting the user
22 to “Watch with your friends” that linked to Hangouts—the precise concept and language
23 described by Be In at the May 12 meeting. (*Id.* ¶ 68.) Google subsequently modified the
24 language to try to cover its tracks, but the language still appeared when a user placed the mouse
25 over the button. (*Id.* ¶ 69.)

26 Google’s argument that Be In “does not allege the required element of misappropriation
27 by *improper means*” is specious. (Mot. at 9.) As detailed above, Be In has pled in detail how its
28

1 trade secrets were expressly disclosed under an obligation of confidentiality and were then used
2 without Be In's permission. It is simply not true that Be In is no longer claiming that
3 Mr. Robinson "or anyone else" communicated these trade secrets to Google. (Mot. at 10.) Be In
4 has specifically alleged that "The features, strategies, and collaborations undertaken by Google
5 since the launch of Hangouts constitute the misappropriation and unauthorized use of Be In's
6 trade secrets disclosed during its May 2011 meeting with Google." (SAC ¶ 75; *see also id.* ¶ 70
7 (accusing Google of "misappropriating Be In's social entertainment integration strategy and
8 integrating Hangouts into YouTube"); *id.* ¶ 80 ("Defendants have acquired, disclosed, and/or
9 used or intend to use Plaintiff's trade secrets through improper means.")). These are not
10 conclusory allegations, but are supported by the specific allegations described above.

11 **2. The Court Should Reject Google's Attempt to Avoid Be In's**
12 **Well-Pleaded Claim for Trade Secret Misappropriation by**
13 **Creating False Distinctions Among Its Corporate Entities**

14 Google claims that Be In's trade secret claim should be dismissed because there is no
15 allegation of wrongful disclosure by someone at Google UK to Google Inc. or YouTube. (Mot. at
16 9-11.) In doing so, Google relies on artificial distinctions among its corporate entities that are
17 contrary to the allegations in the Second Amended Complaint and that it does not itself observe.

18 Be In has specifically alleged that it disclosed the trade secrets to Mr. Robinson as a
19 representative of Google and YouTube. When Be In consultant Bryan Foss first requested the
20 meeting with Mr. Robinson on May 7, 2011, it was with the express suggestion that Be In's
21 platform would "work well *with Google and YouTube.*" (SAC ¶ 38 (emphasis added).)
22 Mr. Robinson was told by Be In in an email on May 9 that Be In "wanted to dive deeper into
23 business plan and strategy and discuss how CamUp can drive tremendous value to giants *like*
24 *YouTube and Google.*" (*Id.* ¶ 44 (emphasis added).) Mr. Robinson was specifically asked to
25 "agree to signing a Mutual Non-Disclosure Agreement *on behalf of Google,*" and that is what he
26 did. (*Id.* (emphasis added).)

27 Mr. Robinson did not respond by saying that Be In had the wrong person if it wanted to
28 disclose business strategies for Google and YouTube. To the contrary, his assistant sent the

1 requested NDA to Be In (*id.* ¶ 46), Mr. Robinson listened to a detailed presentation about
2 strategies aimed specifically at Google products and YouTube (*id.* ¶¶ 48-50), he asked to retain
3 the materials from the meeting and for Be In to send additional information, which it did (*id.*
4 ¶¶ 52-54), and Mr. Robinson “*indicated that he would put Be In in touch with someone from You*
5 *Tube*” (*id.* ¶ 54 (emphasis added)).

6 Mr. Robinson’s conduct was completely inconsistent with the artificial barrier that Google
7 tries to draw here. To the contrary, the reasonable inference is that Mr. Robinson worked with
8 and had direct access to personnel at Google and YouTube and was representing their interests at
9 the meeting. Moreover, the Court must accept as true at this stage Be In’s allegations that Google
10 UK provides “development services to Google and its other subsidiaries.” (SAC ¶ 11.) This in
11 fact accords with reality. According to Google itself, its London-based employees are involved in
12 the development of YouTube. *See London-Google Jobs*, Google.com,
13 <http://www.google.com/about/jobs/locations/london/> (website of Google Inc. listing its London
14 office (under “Address”) and stating, “We’ve done a lot of engineering work on . . .
15 YouTube . . .”).

16 Google also publicly represents that the office in London is a Google Inc. office.² *See id.*
17 (describing the office as “one of Google’s largest engineering operations in Europe”). And, as
18 Google itself points out in this motion, Google treats Google Inc., Google UK Ltd. and YouTube
19 LLC as “group companies” in its contracts, including the NDA signed with Be In in this case.
20 (*See Mot.* at 15 n.5 (citing Declaration of Colleen Bal Exh. A [ECF No. 64-2] §§ 1, 9 (stating
21 Google Inc., Google UK, Ltd., and YouTube LLC are “group companies” of Google Ireland and
22 are bound by nondisclosure agreement). Google plainly does not observe the artificial wall it
23

24 _____
25 ² Moreover, in its annual report, Google treats all of its subsidiaries as a single entity with the
26 parent, explaining that “Google” “we” and “our” include “Google Inc. and its subsidiaries.” The
27 report describes “Google [as] a global technology leader” with “over 85 offices in over 40
28 countries.” (Google, Inc., Annual Report (Form 10-K) (Jan. 29, 2013) at 2-3, 8, *available at*
<http://www.sec.gov/Archives/edgar/data/1288776/000119312513028362/d452134d10k.htm>.)
Google also boasts of “tightened integration between Google+ and our other Google properties,
such as . . . YouTube.” *Id.* at 3.

1 claims exists among Google Inc., Google UK and YouTube. It cannot ignore the allegations of
2 the complaint, and cannot hide behind phony distinctions to avoid Be In's trade secret claims.

3 In effect, Google contends that the trade secret claim should be dismissed because Be In
4 does not detail the specifics of how the trade secret information it provided to Mr. Robinson made
5 its way into Google's products, facts that Be In is not required to allege and could not be expected
6 to know before discovery. Courts regularly deny motions to dismiss trade secret
7 misappropriation claims that make this argument, for complaints far less detailed than Be In's
8 here. In *TMX Funding, Inc. v. Impero Technologies, Inc.*, for example, the plaintiff alleged that
9 laptops and servers were stolen from its offices, and separately that the defendants had used its
10 confidential information. No. C 10-00202 JF (PVT), 2010 U.S. Dist. LEXIS 60260, at *11 (N.D.
11 Cal. June 17, 2010). The defendants in *TMX Funding* contended the complaint "insufficiently
12 allege[d] that *Defendants* actually misappropriated any trade secrets" because the complaint "did
13 not allege specifically that Defendants were responsible for the theft." *Id.* (emphasis in original).
14 Judge Fogel denied the motion, holding that it was sufficient that the complaint alleged on
15 information and belief that defendants had misappropriated plaintiff's confidential information by
16 accessing its networks and servers. *Id.* at *11-12.

17 The connection between the stolen laptops and the Defendants in *TMX* is far more
18 attenuated than the connection here between Mr. Robinson, Google UK and fellow group
19 companies Google and YouTube. As noted above, Mr. Robinson accepted a meeting whose
20 purpose was to disclose business strategies for Google and YouTube, and actually stated he was
21 going to contact someone at YouTube at the close of the meeting, and Google UK employees do
22 development work for YouTube. (SAC ¶¶ 11, 46-54.)

23 Similarly, in *SOAProjects, Inc. v. SCM Microsystems, Inc.*, this Court refused to dismiss a
24 complaint that claimed a non-party former employee took trade secret information, and
25 summarily alleged that defendant corporation "acted in concert" with that employee and
26 "knowingly enjoy[ed] the fruits of [the employee's] theft." No. 10-CV-01773-LHK, 2010 U.S.
27 Dist. LEXIS 133596, at *27-30 (N.D. Cal. Dec. 7, 2010) (Koh, J.). The complaint, explained the
28

1 Court, “alleged more than inevitable disclosure,” and the summary allegation, “in the context of
2 the other circumstantial allegations,” sufficed to state a plausible trade secret misappropriation
3 claim. *Id.* at *29-30; *see also Vinyl Interactive, LLC v. Guarino*, No. C 09-0987 CW, 2009 U.S.
4 Dist. LEXIS 41498, at *21-22 (N.D. Cal. May 1, 2009) (at the complaint stage, “it would be
5 unreasonable to require [the plaintiff] to demonstrate . . . the precise ways in which [d]efendants
6 may have used [the] trade secrets, given that defendants are the only ones who possess such
7 information.”). Be In’s allegations are much more detailed here, and include specific allegations
8 how the trade secrets disclosed at the May 12 meeting were used by Google and YouTube. (*See,*
9 *e.g.*, SAC ¶¶ 48-54, 68-75.)

10 Google cites to *Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th 1658 (2003), for
11 the proposition that Be In has the burden to prove Google did not independently develop the same
12 information. (Mot. at 10.) Even if that proposition were correct, it has no relevance whatsoever
13 to this motion. *Sargent Fletcher* was an appeal decided after a full jury trial, and cannot foreclose
14 Be In’s well-pleaded claim, where the Court must accept as true the allegations that Google did
15 not independently develop the Be In proprietary strategies employed by Google Hangouts and
16 YouTube but misappropriated them from Be In. (*See, e.g.*, SAC ¶¶ 68-75.)

17 This Court rejected the exact argument Google is making here in *Brocade*
18 *Communications Systems, Inc. v. A10 Networks, Inc.*, No. 10-CV-03428-LHK, 2011 U.S. Dist.
19 LEXIS 30227, at *18 (N.D. Cal. Mar. 23, 2011) (Koh, J.). In *Brocade*, similar to Google here,
20 the defendant argued that “it is ‘equally plausible that [the defendant] brought its accused
21 [product] to market through completely proper means’” rather than as plaintiff alleged in the
22 complaint. *Id.* at *17-18. The court denied the motion to dismiss, stating that the defendant’s
23 argument “misapprehends the relative burdens at this point in the litigation.” *Id.* at *18. The
24 Court is not weighing the relative probabilities that the facts alleged are true. *Id.* at *18 (citing *al-*
25 *Kidd*, 580 F.3d at 977); *see also Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (where
26 plaintiff and defendant advance “two alternative explanations . . . both of which are plausible,
27 plaintiff’s complaint survives a motion to dismiss under Rule 12(b)(6).”).

1 **B. Be In Has Properly Pleaded that Google Breached the CamUp Terms**
2 **of Service**

3 Be In’s fourth cause of action for breach of contract alleges that Google breached the
4 Terms of Service on the CamUp website, which provide that content on the website is “for your
5 information and personal use only and may not be downloaded, copied, reproduced, distributed,
6 broadcast, displayed, sold, licensed or otherwise exploited for any other purposes whatsoever
7 without the prior written consent of the respective owners.” (SAC ¶ 99 (emphasis added).) The
8 complaint alleges on information and belief, among other things, that Defendants and their
9 employees and agents “used and/or visited the CamUp website for the purpose . . . of copying,
10 downloading, reproducing, distributing or exploiting [the website] for commercial purposes . . . to
11 develop and launch Hangouts[, without Be In’s permission].” (SAC ¶ 101.)

12 This is more than sufficient to state a claim for breach of the Terms of Service. Google
13 incorrectly claims that Be In has not properly alleged formation of a contract and raises a series of
14 factual disputes that cannot be considered on a motion to dismiss.

15 **1. Individuals Acting on Google’s Behalf Who Logged In to the**
16 **CamUp Website Formed a Contract with Be In**

17 Be In has alleged that individuals acting on Google’s behalf agreed to the CamUp Terms
18 of Service when they accessed the CamUp website.³

19 The link to the Terms of Service is displayed prominently at the bottom of the CamUp
20 home page. (SAC ¶ 98.) Any visitor to www.camup.com will see a hyperlink on the CamUp
21 home page to the CamUp “Terms of Service,” and using and/or visiting the site requires
22 accepting these Terms. (SAC ¶ 98.) Be In has alleged that Google agreed to these Terms when it
23 visited the website. (See SAC ¶ 58 (“[Copying] was in direct violation of CamUp’s ‘Terms of
24 Service,’ which [Google] agreed to when it used and/or visited the CamUp website.”) .)

25

26 ³ Be In agrees with Google that the elements of a contract cause of action are substantially
27 the same whether New York or California law ultimately governs. See *McKell v. Wash. Mut.,*
28 *Inc.*, 142 Cal. App. 4th 1457, 1489 (2006); *Clarke v. Max Advisors, LLC*, 235 F. Supp. 2d 130,
 141 (N.D.N.Y. 2002) (citing *Furia v. Furia*, 116 A.D.2d 694, 695 (N.Y. App. Div. 1986)).

1 Significantly, Google never even argues that the Terms of Service were difficult to find or that the
2 site provided inadequate notice.

3 Courts routinely enforce “browsewrap” agreements where a hyperlink provides access to a
4 site’s terms of service, and the site requires acceptance of those terms to continue using the site.
5 “[A] party’s use of a website may be sufficient to give rise to an inference of assent to the Terms
6 of Use contained therein (so called ‘browsewrap contracts’).” *Molnar v. 1-800-Flowers.com,*
7 *Inc.*, No. CV 08-0542 CAS (JCx), 2008 U.S. Dist. LEXIS 120863, at *3, 18 (C.D. Cal. Sept. 29,
8 2008) (denying motion to dismiss where website provided link to Terms of Use stating: “By
9 accessing any areas of the web site you agree to be legally bound, and to abide by, these Terms of
10 Use.”) (internal quotation marks omitted); *see also Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507
11 F. Supp. 2d 1096, 1108-09, 1112-13 (C.D. Cal. 2007) (granting preliminary injunction on
12 copyright and breach of contract claim where defendant used automated devices to access
13 plaintiff’s website in violation of Terms of Use accessible via hyperlinks); *Pollstar v. Gigmania*
14 *Ltd.*, 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000) (denying motion to dismiss breach of
15 browsewrap contract claim because “people sometimes enter into a contract by using a service
16 without first seeing the terms”).

17 Any agent acting on Google’s behalf could bind Google to the Terms of Service. *See*
18 *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 936 (E.D. Va. 2010) (holding that “to the
19 extent that any contract exists, [independent contractor’s] assent to that contract would bind
20 Eventbrite, the principal.”).⁴

21 Google complains that Be In does not allege “the version of the Terms of Service” to
22 which it agreed. (Mot. at 13.) But Be In alleged that the terms pleaded in the complaint were in
23 effect “[at] all relevant times.” (SAC ¶ 98.) Be In need not allege that any particular version of
24

25 ⁴ While the court in *Cvent* ruled that Eventbrite did not have adequate notice of the terms
26 because the link to the terms was buried under “twenty-eight different links separated into four
27 columns and grouped under four headings,” *Cvent*, 739 F. Supp. 2d at 933, the present case is
28 distinguishable. The link to Terms of Service is one of only two links on the CamUp home page
in addition to the registration and login link.

1 the Terms of Service was in effect at the time of the visit to the website. *See Molnar*, 2008 U.S.
2 Dist. LEXIS 120863, at *16-17 (allowing counterclaim to proceed despite the fact that website
3 operator neither attached terms of use to its counterclaim nor specifically alleged that forum
4 selection clause at issue was present in terms of use at time plaintiff used website).

5 **2. Google’s Attempts to Raise Factual Disputes at This Stage Are**
6 **Improper**

7 Google does not dispute that if its employees or agents copied or distributed material from
8 the CamUp website, their conduct violated the Terms of Service. Instead, Google focuses on
9 whether there is enough evidence that its employees accessed CamUp or agreed to its terms.
10 (Mot. at 12-13.) Google further argues that any hypothetical use of the site *without* copying or
11 distributing its contents would not have breached the Terms of Service. (*Id.* at 13.)

12 Google’s arguments amount to factual disputes, but on a motion to dismiss the Court must
13 accept Be In’s factual allegations as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While
14 Google complains that Be In’s allegations are “on information and belief” (Mot. at 13-14), a
15 plaintiff may plead on information and belief “where the facts are peculiarly within the
16 possession and control of the defendant . . . or where the belief is based on factual information
17 that makes the inference of culpability plausible.” *Arista Records LLC v. Doe 3*, 604 F.3d 110,
18 120 (2d Cir. 2010) (citations omitted). “A claim has facial plausibility when the plaintiff pleads
19 factual content that allows the court to draw the reasonable inference that the defendant is liable
20 for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citation omitted); *see also Deng v.*
21 *Searchforce, Inc.*, No. C 11-00254 WHA, 2011 U.S. Dist. LEXIS 47070, at *4 (N.D. Cal.
22 Apr. 25, 2011) (granting leave to file amended complaint with contract claims based partly on
23 allegations made on information and belief); *Kowalsky v. Hewlett-Packard Co.*, No. 10-CV-
24 02176-LHK, 2011 U.S. Dist. LEXIS 89379, at *11-13 (N.D. Cal. 2011) (Koh, J.) (denying
25 motion to dismiss unfair competition claim where plaintiff “plead facts,” including facts alleged
26 on information and belief, “raising a plausible inference that HP knew, or . . . should have known,
27 of the defect”) (internal citation and quotation marks omitted).

1 Be In has pleaded facts sufficient to support a plausible inference that defendants, acting
2 through their agents or employees, misused the CamUp site in violation of the Terms of Service.
3 Be In alleges that CamUp “was one of a kind and offered something that no company had ever
4 achieved.” (SAC ¶ 25.) It describes at length how “the creative design of Hangouts is strikingly
5 similar” to the CamUp website and the unique and expressive elements of the CamUp website.
6 (*See, e.g., id.* ¶¶ 5, 61-64.)

7 Be In has also alleged that Google’s employees saw multiple demonstrations of CamUp
8 (*id.* ¶¶ 32-36), and negotiated with Be In regarding the possible use of Be In’s technology (*id.*
9 ¶¶ 38, 42, 44-47, 53-56). It is a natural inference that someone investigating CamUp—whether to
10 do business with Be In or to take Be In’s work—would access the CamUp website. In light of
11 these circumstances, it is more than plausible that “Defendants and/or their employees, agents,
12 and/or other individuals acting on their behalf repeatedly accessed the CamUp website for the
13 purpose of copying the CamUp platform without permission,” breaching Be In’s Terms of
14 Service in the process. (*Id.* ¶¶ 57, 101.)

15 Google argues that the similarity between Hangouts and CamUp is “equally consistent
16 with legal and illegal behavior.” (Mot. at 14). Be In disagrees. But, as noted above, a complaint
17 survives dismissal even if two alternative explanations are plausible. *See Starr*, 652 F.3d at 1216.
18 Copying from a trade show or other demonstration, as opposed to the website, would still be
19 illegal behavior under Be In’s copyright claim. And it is quite plausible that Google copied from
20 *both* Be In’s demonstrations and its website.

21 Google also argues that a user could avoid agreeing to the CamUp Terms of Service by
22 “simply discontinu[ing] use of the website.” (Mot. at 12.) The “browsewrap” authorities cited
23 above foreclose Google’s argument, which would effectively invalidate *any* browsewrap
24 agreement. Users may not engage in conduct prohibited by a website’s terms of service and then
25 claim there was no contract by simply navigating away. In any event, Be In is not concerned with
26 users who view the CamUp homepage and then turn away without logging in or doing anything
27 more; Be In is suing because Google exploited the contents of the site beyond the login page.
28

1 **C. The Breach of Implied In Fact Contract Claim Is Adequately Pleaded**

2 Be In’s Third Cause of Action properly pleads a claim for breach of implied in fact
3 contract. An implied in fact contract is created where there is a voluntary agreement to receive an
4 idea, knowing that payment is expected if the idea is used. *Chandler v. Roach*, 156 Cal. App. 2d
5 435, 440-41 (1957). Consideration need not be express; it can be inferred from the
6 circumstances. *Gunther-Wahl Prods., Inc. v. Mattel, Inc.*, 104 Cal. App. 4th 27, 42-43 (2002).

7 Be In has properly pleaded that an implied in fact contract was created when Be In
8 disclosed its proprietary business and marketing strategies in confidence to Defendants at the
9 May 12 meeting on the understanding that they would only use those strategies if they
10 compensated Be In for their value, and Google voluntarily accepted that disclosure. (*See, e.g.*,
11 SAC ¶¶ 44-46, 53, 93-94.) Defendants breached that implied in fact contract when they utilized
12 Be In’s confidential strategies without compensating Be In. (*See, e.g.*, SAC ¶¶ 68-75, 95.)

13 Google challenges the implied in fact contract claim by seeking to impose requirements
14 for that claim that do not exist under California law.⁵ And its argument that the parties’ NDA
15 bars the implied contract claim fails because the two agreements do not govern the same subject
16 matter, and the remedies in the NDA do not purport to be exclusive.

17 **1. An Implied Contract Requires a Disclosure of an Idea that May**
18 **Be of Substantial Benefit to the Receiver with a Reasonable**
19 **Expectation of Payment and a Voluntary Agreement to Receive**
20 **that Disclosure**

21 A claim for breach of implied contract is adequate if the necessary allegations for an
22 implied contract appear in the complaint and it does not appear impossible to prove the existence
23 of an implied contract. *Thompson v. Cal. Brewing Co.*, 150 Cal. App. 2d 469, 473-74 (1957)
24 (reversing grant of defendant’s demurrer). Only a minimal showing of mutual assent and
25 consideration is necessary. *Chandler*, 156 Cal. App. 2d. at 440-41. Specifically, a voluntary
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27 ⁵ The parties agree that California law applies. (Mot. at 14 n.4.)
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1 agreement to receive the presentation of an idea knowing that payment is expected if the idea is
2 used is sufficient for finding mutual assent.⁶ *Id.* at 441.

3 In addition, the agreement to pay need not be express for there to be consideration.
4 *Gunther-Wahl*, 104 Cal. App. 4th at 42-43. Rather, consideration can be implied through the
5 facts and circumstances of the disclosure. *Chandler*, 156 Cal. App. 2d at 440-41. For example,
6 disclosure of the idea is consideration for the promise to pay if the disclosure could be of
7 substantial benefit to the person to whom it is disclosed. *Id.* at 441.

9 Be In's allegations about its disclosure of confidential business and marketing strategies
10 specific to Google are sufficient to support a cause of action based on implied contract. In
11 *Minniear v. Tors*, 266 Cal. App. 2d 495 (1968), the California Court of Appeal found pleadings
12 similar to those here to be sufficient. In *Minniear*, the plaintiff presented his pilot to the
13 defendant in defendant's screening room. *Id.* at 498. After the presentation, defendant requested
14 additional materials relating to the idea. *Id.* at 504. Here, Be In disclosed certain confidential
15 business and marketing strategies specific to Google at a presentation at Google's London office.
16 (SAC ¶¶ 44, 47-53.) Following the meeting, Google requested that Be In supply additional
17 materials relating to the confidential strategies disclosed in the meeting, and Be In did. (*Id.* ¶ 54.)
18 The Second Amended Complaint alleges that it was understood by both parties that any use of the
19 information by Google required Google to take a license from Be In. (*Id.* ¶¶ 53, 93.) As in
20 *Minniear*, the conditions and circumstances of Be In's disclosure satisfy the elements of assent
21 and consideration.
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26 ⁶ In *Gunther-Wahl*, the court even suggests that submission of an idea at defendant's place
27 of business, whether or not at plaintiff's request, may "mandate[] a finding of implied-in-fact-
28 contract for compensation for use." *Gunther-Wahl*, 104 Cal. App. 4th at 43 (emphasis added).

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2. An Implied Contract Does Not Require Agreement on a Specific Licensing Fee

Google incorrectly asserts that Be In’s cause of action “fails basic contract formation principles” because it “lacks material terms” such as a specific licensing fee. (Mot. at 20.) California courts do not require that parties to an implied contract specify a licensing fee at the time the implied promise is made. Rather, the courts speak in terms of a general expectation of compensation. *Minniear*, 266 Cal. App. 2d at 504 (stating that the assent of an offeree is manifested by his acceptance of an idea with a reasonable understanding that the offeror “expects payment of the *reasonable value* of the idea or the material, if used”) (emphasis added) (original emphasis omitted); *Desny v. Wilder*, 46 Cal. 2d 715, 724-25 (finding sufficient the allegation that defendant could use plaintiff’s idea only if it paid “the reasonable value thereof.”). Google and Be In’s mutual understanding that Google would compensate Be In if it used the confidential information outside the scope of the NDA is sufficient to find that an implied contract exists.

3. The NDA Does Not Bar a Cause of Action Based on an Implied Contract

Neither the existence of the NDA nor the express terms of the agreement limit Be In’s rights to bring a claim for breach of implied contract. The NDA relates to Google’s agreement to keep Be In’s trade secrets in confidence while evaluating the possibility of a business transaction. (NDA, Bal Decl. Exh. A [ECF No. 64-2] § 3 (“Receiver shall protect Confidential Information and prevent any unauthorized use or disclosure of Confidential Information.”).) It does not govern Be In’s separate right to receive compensation if Google utilized its trade secrets.

The decisions relied upon by Google are inapposite. The terms of each express contract in Google’s cited cases covered “identical” subject matter, which is not the case here. In *Tollefson v. Roman Catholic Bishop of San Diego*, 219 Cal. App. 3d 843 (1990), the court states that there cannot be both an express and implied contract that “embrace the identical subject, but require[a]

1 different result[.]” *Id.* at 855. There, the plaintiff employee tried to transform her fixed one-year
2 term contract to a contract for continuing employment terminable only for just cause. *Id.* at 856.
3 Similarly, in *Wal-Noon Corp. v. Hill*, 45 Cal. App. 3d 605 (1975), the court refused to allow
4 plaintiff lessee to be reimbursed under a theory of quasi-contract for repairs it made to a unit
5 when the written lease contract clearly allocated the responsibility for such repairs to defendant
6 lessor. *Id.* at 612-13 (refusing to allow both an express and implied contract that “embraces the
7 same subject matter”) (citation omitted). In *Lance Camper Manufacturing Corp. v. Republic*
8 *Indemnity Co.*, 44 Cal. App. 4th 194 (1996), the plaintiff realleged the existence of the express
9 contract in its claim for quasi-contract. The court refused to allow both claims because the
10 plaintiff would be required to void or rescind the express contract (under which it received
11 benefits) in order to proceed with its quasi-contract claims and such an act is “internally
12 inconsistent.” *Id.* at 203.

15 Here, unlike the cases cited by Google, the written NDA and implied contract do not
16 cover the “same subject matter.” The NDA grants Google the narrow right to “evaluate” the
17 possibility of a business transaction. (NDA, Bal Decl. Exh. A [ECF No. 64-2] § 3 (“In order to
18 evaluate, and if appropriate enter into and complete, one or more business transactions from time
19 to time (the “Purpose”) Receiver may only use Confidential Information for the Purpose.”).)
20 The implied contract, on the other hand, protects Be In’s reasonable expectation to receive
21 compensation if Google utilized its idea beyond mere evaluation. *Chandler*, 156 Cal. App. 2d at
22 441; (SAC ¶ 53; *cf.* NDA, Bal Decl. Exh. A [ECF No. 64-2] § 8 (“No party acquires any
23 intellectual property rights under this NDA)). Therefore, because the two contracts cover
24 distinct rights, the written NDA does not preclude Be In from alleging a cause of action for
25 breach of implied contract. Moreover, the NDA does not contain an exclusivity statement
26 limiting the availability of an alternate remedy. (NDA, Bal Decl. Exh. A [ECF No. 64-2]); *see*

1 also 1 Bernard E. Witkin, *Summary of California Law, Contracts* § 855(2), at 942-943, (10th ed.
2 2005) (“An intent to limit the injured party’s remedies to the one specified in the contract must be
3 clearly indicated.”).

4 Google also argues that if the implied contract “substitutes” for the written NDA Google
5 is “forced into an involuntary business transaction with [Be In].” (Mot. at 19.) This is not so; Be
6 In did not force Google to use the confidential information it conveyed, but having done so
7 Google must pay for that use. As discussed above, the NDA and implied contract cover different
8 issues. Moreover, as discussed above, breach of implied contract is a distinct cause of action
9 recognized in California, and Be In has sufficiently pleaded all elements of this cause of action.
10 Contrary to Google’s claims, Be In is not substituting monetary damages, the ordinary measure of
11 damages for breach of contract, with a “forced business partnership as the penalty for breach.”
12 (Mot. at 19.) Rather, Be In seeks damages as compensation for the value, and the time, resources
13 and ingenuity it devoted to developing the unique strategies it disclosed to Google, consistent
14 with the law of implied contract. *See Hill v. Waxberg*, 237 F.2d 936, 939 (9th Cir. 1956) (stating
15 that the general contract theory of compensatory damages should be applied in a claim for breach
16 of implied contract).

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19 **D. Be In Agrees to Dismiss Its Request for Statutory Copyright Damages**

20 Be In will not to seek statutory copyright damages in this action.

21 **V. CONCLUSION**

22 For the foregoing reasons, Be In respectfully requests that the Court deny Google’s
23 motion to dismiss.

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Dated: August 1, 2013

MORRISON & FOERSTER LLP

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